Commerzbank (South East Asia Ltd) v Tow Kong Liang

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24–1794 OF 1999
ABDUL WAHAB J
9 JANUARY 2002

Civil Procedure *— Reciprocal enforcement of foreign judgments — Registration — Application to set aside — Submission to jurisdiction of courts in Singapore — Defendant agreed to submit to jurisdiction of courts in Singapore before commencement of proceedings in Singapore — Reciprocal Enforcement of Judgments Act 1958, s 5(2)(a)(iii)*

Civil Procedure *— Reciprocal enforcement of foreign judgments — Registration — Application to set aside — Service of foreign legal process — Procedures under O 65 r 2 or O 65 r 3 of Rules of the High Court 1980 not been complied with — Whether contrary to public policy in Malaysia to allow enforcement of judgment which was obtained consequent upon failure to observe rules*

The plaintiff obtained judgment in default of appearance against the defendant at the High Court of the Republic of Singapore ('the Singapore judgment'). The defendant was a guarantor in respect of certain facilities granted to a company registered in the British Virgin Islands ('BVI'). Thereafter, the High Court in Malaya at Johore Bahru granted an order upon the ex-parte application of the plaintiff to register the Singapore judgment under s 4 of the Reciprocal Enforcement of Judgments Act 1958 ('the Act'). The defendant applied to set aside the registration of the Singapore judgment under s 5 of the Act on the grounds that: (a) the High Court of the Republic of Singapore had no original jurisdiction as the defendant had neither appeared nor taken substantive part in the proceedings in the Singapore court; and (b) the enforcement of the Singapore judgment would be contrary to public policy in Malaysia. The defendant asserted that the plaintiff was illegally engaging in banking activities in Malaysia as the offer of the loan facility was made by the plaintiff's agent in Malaysia. The funds were then disbursed to an inactive and insolvent company registered in the BVI and the defendant was made a guarantor in respect of the loan. According to the defendant, the scheme was implemented to circumvent s 11 of the Exchange Control Act 1953 ('the ECA').

Held, allowing the defendant's application:

(1) Clause 29 of the guarantee executed by the defendant provided that the courts of Singapore were to have jurisdiction to settle any disputes that may arise in connection with the guarantee and that any suit arising out of the guarantee may be brought in such courts. Since the defendant had, before the commencement of the proceedings in Singapore, specifically agreed to submit to the

jurisdiction of the courts in Singapore, the defendant was caught by s 5(2)(a)(iii) of the Act. The fact that the defendant had neither appeared nor taken a substantial part on the proceedings in the Singapore court was immaterial (see p 359C–G).

(2) An application under s 5 of the Act was not the occasion to review the decision of the High Court Singapore as to whether judgment in default of appearance ought to have been entered in Singapore or otherwise. It was not for this court to look into the Singapore laws with regard to service in Malaysia. It was sufficient for consideration under ss 4 and 5 of the Act that the court in Singapore had entered judgment and that judgment was produced before the court in Malaysia (see p 360A–B).

(3) The comptroller's approval under s 11 of the ECA was required for the issue of shares and not for the grant of loan facility for the purpose of buying shares. In any case, the defendant had failed to show that the loan facility was in fact used for the purchase of shares (see p 361A–B).

(4) The defendant's assertions that the plaintiff was conducting banking business in Malaysia without a valid licence granted under s 6(4) of the Banking and Financial Institutions Act 1989 ('BAFIA') were clearly disputed by the plaintiff's averments. There was no doubt that the defendant had failed to place before the court any credible case that the plaintiff was conducting business in Malaysia so as to warrant consideration of whether there was a breach of s 4 of BAFIA or whether such breach required the application of s 5(1)(a)(v) of the Act (see pp 361C, 363A–B).

(5) Order 65 r 2 of the Rules of the High Court 1980 ('the RHC') made provision for the service of foreign legal process, including citations in Malaysia. Pursuant to O 65 r 2 of the RHC, a letter of request from a court or other tribunal of a foreign country requesting service upon a person in Malaysia must be received by the Minister who would then send the same to the High Court with an intimation that it was desirable that effect should be given to the request. Service would then be effected by the process server. This procedure embodied the giving of consent to the exercise of sovereignty in Malaysia by the foreign country by the service of the process of its court or other tribunal. Here, the procedure under O 65 r 2 of the RHC had not been complied with (see pp 363I, 364H–365A).

(6) An alternative to O 65 r 2 of the RHC was provided for under O 65 r 3 of the RHC. Thus, where there was a civil procedure convention between the foreign country and Malaysia, the request may be made directly to the registrar by way of a request from a consular or other authority of the foreign country (see p 365A–H).

(7) In the instant case, the plaintiff had not complied with either one of the two alternatives and it would be contrary to public policy in Malaysia to allow the enforcement of the judgment which was obtained consequent upon a failure to observe the rules (see p 365H–I).

[Bahasa Malaysia summary

Plaintif telah memperoleh penghakiman ingkar kehadiran terhadap defendan di Mahkamah Tinggi Republik Singapura ('penghakiman Singapura tersebut'). Defendan adalah penjamin berhubung dengan kemudahan tertentu yang diberikan oleh sebuah syarikat yang berdaftar di British Virgin Islands ('BVI'). Berikutan itu, Mahkamah Tinggi Johor Bahru telah membenarkan satu perintah atas permohonan ex parte plaintif untuk mendaftar penghakiman Singapura tersebut di bawah s 4 Akta Penguatkuasaan Penghakiman Bersaling 1958 ('Akta tersebut'). Defendan telah memohon untuk mengetepikan pendaftaran penghakiman Singapura tersebut di bawah s 5 Akta tersebut atas alasan-alasan bahawa: (a) Mahkamah Tinggi Republik Singapura tidak mempunyai bidang kuasa asal kerana defendan tidak hadir maupun mengambil bahagian yang substantif dalam prosiding di mahkamah Singapura; (b) penguatkuasaan penghakiman Singapura tersebut akan bertentangan dengan polisi awam di Malaysia. Defendan menegaskan bahawa plaintif terlibat secara haram dalam aktiviti-aktiviti perbankan di Malaysia kerana tawaran kemudahan pinjaman telah dibuat oleh ejen plaintif di Malaysia. Wang tersebut kemudiannya telah disalurkan kepada satu syarikat yang tidak aktif dan tak solven yang berdaftar di BVI dan defendan telah dijadikan penjamin berhubung pinjaman tersebut. Menurut defendan, rancangan ini dibuat untuk memintas s 11 Akta Kawalan Pertukaran Mata Wang 1953 ('AKW').

Diputuskan, membenarkan permohonan defendan tersebut:

(1) Klausa 29 jaminan yang disempurnakan oleh dedendan memperuntukkan bahawa mahkamah-mahkamah Singapura akan mempunyai bidang kuasa untuk menyelesaikan apa-apa pertikaian yang mungkin timbul berkaitan dengan jaminan ini dan bahawa apa-apa guaman yang timbul daripada jaminan ini boleh dihadapkan ke mahkamah-mahkamah tersebut. Memandangkan defendan telah, sebelum prosiding di Singapura dimulakan, dengan khususnya telah bersetuju untuk dihadapkan kepada bidang kuasa mahkamah-mahkamah di Singapura, defendan telah terikat dengan s 5(2)(a)(iii) Akta tersebut. Hakikat bahawa defendan tidak hadir maupun mengambil bahagian substantif dalam prosiding di mahkamah Singapura adalah tidak material (lihat ms 359C–G).

(2) Satu permohonan di bawah s 5 Akta tersebut bukan satu cara untuk mengkaji semula keputusan Mahkamah Tinggi Singapura tentang sama ada penghakiman ingkar kehadiran patut dimasuki di Singapura atau sebaliknya. Ia bukan untuk mahkamah ini melihat kepada undang-undang Singapura berhubung penyampaian di Malaysia. Adalah mencukupi untuk dipertimbangkan di bawah ss 4 dan 5 Akta tersebut bahawa mahkamah di Singapura telah memasuki penghakiman dan penghakiman tersebut telah dikemukakan di hadapan mahkamah di Malaysia (lihat ms 360A–B).

(3) Kelulusan penguasa di bawah s 11 AKW diperlukan untuk mengeluarkan saham-saham dan bukan untuk memberikan kemudahan pinjaman bagi tujuan membeli saham-saham. Dalam apa keadaanpun, defendan telah gagal untuk menunjukkan bahawa kemudahan pinjaman tersebut sememangnya digunakan untuk membeli saham-saham (lihat ms 361A–B).

(4) Hujah defendan bahawa plaintif menjalankan perniagaan perbankan di Malaysia tanpa lesen sah yang diberikan di bawah s 6(4) Akta Bank dan Institusi-Institusi Kewangan 1989 ('ABIK') dengan jelas dipertikaikan oleh penegasan plaintif. Tiada keraguan bahawa defendan telah gagal untuk mengemukakan di hadapan mahkamah apa-apa keterangan yang boleh dipercayai bahawa plaintif sedang menjalankan perniagaan di Malaysia yang mewarankan pertimbangan sama ada terdapat pelanggaran s 4 ABIK atau sama ada pelanggaran sedemikian memerlukan permohonan s 5(1)(a)(v) Akta tersebut (lihat ms 361C, 363A–B).

(5) Aturan 65 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') membuat peruntukan untuk penyampaian proses undang-undang negara asing, termasuklah saman-saman di Malaysia. Menurut A 65 k 2 KMT, sepucuk surat permohonan daripada mahkamah atau tribunal lain sebuah negara asing memohon penyampaian ke atas seseorang di Malaysia mestilah diterima oleh Menteri yang akan kemudiannya menghantar yang sama ke Mahkamah Tinggi dengan pendapat bahawa adalah elok permohonan tersebut dibenarkan. Penyampaian kemudian akan dikendalikan oleh penyampai proses tersebut. Prosedur ini merangkumi pemberian persetujuan untuk menggunakan kedaulatan Malaysia oleh sebuah negara asing melalui penyampaian proses mahkamah atau tribunalnya. Di sini, prosedur di bahwa A 65 k 2 KMT telah tidak dipatuhi (lihat ms 363I, 364H–365A).

(6) Satu alternatif kepada A 65 k 2 KMT diperuntukkan di bawah A 65 k 3 KMT. Oleh itu, di mana terdapat satu konvensyen prosedur sivil antara negara asing dan Malaysia, permohonan tersebut boleh dibuat secara terus kepada pendaftar melalui satu permohonan daripada konsular atau pihak berkuasa lain negara asing tersebut (lihat ms 365H–I).

A (7) Dalam kes ini, plaintif tidak mematuhi kedua-dua alternatif tersebut dan ia adalah bertentangan dengan polisi awam di Malaysia untuk membenarkan penguatkuasaaan penghakiman tersebut yang diperolehi berikutan kegagalan untuk mematuhi peraturan (lihat ms 365H–I).]

B

Notes

For a case on reciprocal enforcement of foreign judgments, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 5042.

C **Cases referred to**

Afro Continental Nigeria Ltd v The Meridian Shipping Co SA [1982] 2 Lloyd's Rep 241 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Sunkyong International Inc v Malaysian Rubber Development Corp Bhd [1992] 2 MLJ 146 (refd)

D *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 ss 4, 6(4)

E Exchange Control Act 1953 s 11

Reciprocal Enforcement of Judgments Act 1958 (Revised 1972) ss 4, 5(1)(a)(ii), (2)(a)(i), (iii), (v)

Rules of the High Court 1980 O 65 r 2

Rules of the High Court [Sing] O 11

F *Shoba* (*Shearn Delamore & Co*) for the plaintiff.

MS Murthi (*Murthi & Partners*) for the defendant.

Abdul Wahab J: A sealed copy of a writ of summons dated 11 November 1998 issued by the High Court of the Republic of Singapore Suit No 2059 G of 1998 in a Singapore action against the defendant, Tow Kong Liang, as second defendant, and a copy of the order of the Singapore Court in that action dated 12 November 1998, granting the plaintiff leave to serve out of jurisdiction, was served personally on the defendant on 4 January 1999 by one Lim Kang San, an advocate and solicitor, who gave his address as care of No 42 (01–02) Jalan Tun Abdul Razak, Susur Satu, 80000 Johor Bahru, H the plaintiff Commerzbank (South East Asia Ltd). Upon the defendant failing to enter appearance, the plaintiff obtained a judgment in default of appearance on 26 January 1999 against the defendant for the repayment of US$7,670,953.26, with the interest thereon from 15 October 1998 and costs ('the Singapore judgment').

I On 17 February 2000, the High Court in Malaya at Johor Bahru granted an order upon the ex parte application of the plaintiff Commerzbank (South East Asia Ltd) to register the Singapore judgment

under s 4 of the Reciprocal Enforcement of Judgments Act 1958 (Revised 1972) ('the REJA'). A

The defendant filed a summons in chambers on 24 June 2000 to set aside the registration of the Singapore judgment under s 5 of the REJA upon the following grounds:

(1) that the High Court of the Republic of Singapore has no original jurisdiction in the circumstances of the case; B

(2) that the defendant, being the defendant in the proceedings in the Singapore High Court did not receive notice of those proceedings in sufficient time;

(3) that the enforcement of the judgment would be contrary to public policy in Malaysia; C

(4) the second ground was withdrawn during the course of submissions.

Jurisdiction of the Singapore court

The first ground arises from s 5(1)(a)(ii) of the REJA which provides: D

> (ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case.

The defendant's submission relies upon the claim by the defendant that the Singapore Court cannot be deemed to have jurisdiction under s 5(2)(a) of the REJA because he had neither appeared nor taken a substantive part in the proceedings in the Singapore Court. In *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474 at p 479, Ian Chin J had concluded: E

> ... In fact, the case did say that you could have a prior agreement to submit to the jurisdiction. I do not see how it can be argued otherwise when s 5(2)(a)(iii) says that the court shall be deemed to have jurisdiction when a defendant has agreed to submit to the jurisdiction. F

Section 5(2) of the REJA provides as follows:

> (2) For the purposes of this section, the courts of the country of the original court shall, subject to sub-s (3), be deemed to have had jurisdiction: G
>
> (a) in the case of a judgment given in an action in personam:
>
> (i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure, in the proceedings or of contesting the jurisdiction of that court; H
>
> (ii) if the judgment debtor was the plaintiff in, or counterclaimed in, the proceedings in the original court;
>
> (iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings to submit to the jurisdiction of that court or of the courts of the country of that court; I

(iv) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or

(v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place.

The guarantee dated 18 April 1996, exhibited as exh YYC-2 in the affidavit of one Yak Yew Chee, a senior manager in the plaintiff bank, was signed by the defendant to guarantee a loan facility to Vastar Group Ltd BVI, the first defendant in the Singapore action, provides specifically in cl 29 as follows:

> Governing Law and Jurisdiction
>
> This guarantee shall be governed by and construed in accordance with the laws of Singapore and it is irrevocably agreed by the guarantor for the exclusive benefit of the Bank, that the courts of Singapore are to have jurisdiction to settle any disputes which may arise out of or in connection with this guarantee and that accordingly any suit action or proceeding arising out of or in connection with this guarantee (in this clause referred to as 'Proceedings') may be brought in such courts and nothing in this clause shall limit the right of the Bank to take Proceedings against the guarantor in the courts of any other jurisdiction in which the guarantor has assets or a place of business or in any other court which has competent jurisdiction over the guarantor.
>
> The guarantor irrevocably agrees that an appeal from the decision of the appellate court in proceedings in Singapore may be brought by the Bank before the judicial committee of the Privy Council and agrees to be bound by the decision of the judicial committee of the Privy Council in such appeal.

In the light of cl 29 of the guarantee signed by the defendant, s 5(2)(a)(i) of the REJA is irrelevant. Since the defendant had, before the commencement of the proceedings, specifically agreed, in respect of the subject matter of the proceedings under the guarantee, to submit to the jurisdiction of the courts of Singapore, the defendant is caught by s 5(2)(a)(iii) of the REJA whereby the Singapore court shall be deemed to have jurisdiction. That the defendant had neither appeared nor taken a substantive part in the proceedings in the Singapore Court is therefore immaterial.

That the enforcement would be contrary to public policy in Malaysia

This ground arises from s 5(1)(a)(v) of the REJA which provides:

(v) that the enforcement of the judgment would be contrary to public policy in Malaysia;

Two matters were relied upon under this ground that enforcement of the judgment would be contrary to public policy:

(a) that the enforcement of the judgment would be contrary to the Banking and Financial Institutions Act 1989 ('the BAFIA') and the Exchange Control Act 1953 ('the ECA'); and

(b) that service by a private agent is against public policy. A

It is trite law that an application under s 5 of the REJA is the occasion to review the decision of the High Court of Singapore as to whether or not judgment in default of appearance ought to have been entered in Singapore. It is not for this court therefore, to look into the Singapore laws with regard to service in a foreign country, and in particular, in Malaysia. I would not B therefore touch upon O 11 of the Rules of the High Court of the Republic of Singapore. It is sufficient for consideration under ss 4 and 5 of the REJA that the court in Singapore has entered judgment, and that judgment is produced before the court in Malaysia.

The defendant had asserted in his affidavit of 20 June 2000 that the plaintiff was illegally engaging in banking activities in Malaysia. Specifically, C it was asserted that the offer of the loan facility was made by the plaintiff's agent in Malaysia, and in view of the provisions of B and the ECA, the funds were disbursed to an inactive and insolvent company registered in the British Virgin Islands, and the defendant was made a guarantor to the company. It was further alleged by the defendant that the said company was D a shelf company of the plaintiff bank and that the defendant was guaranteeing a loan extended to the plaintiff's company. It was submitted that the scheme was implemented to circumvent the laws of Malaysia.

The defendants relied upon s 11 of the ECA which provides:

> Issue of securities E
>
> (1) Except with the permission of the controller, no person shall, in Malaysia, issue any security or do any act which involves, is in association with or is preparatory to the issuing outside Malaysia of any security which is registered or to be registered in Malaysia, unless the following requirements are fulfilled:
>
> (a) neither the person to whom the security is to be issued nor the F person, if any, for whom he is to be a nominee is resident outside the scheduled territories; and,
>
> (b) the prescribed evidence is produced to the person issuing the security as to the residence of the person to whom it is to be issued and that of the person, if any, for whom he is to be a nominee. G

The defendant had submitted that the securities deposited for the loan are shares in Malaysian companies, and the purpose of the loan facility is expressed as being partially for the purchase of shares in a Malaysian company, Malex Industries Bhd, and the balance for investment purposes. H

The purpose of the loan is disclosed in exh YYC-5, a credit facility letter dated 9 June 1997, in the affidavit of one Yak Yew Chee. It is addressed to Vastar Group Ltd BVI, and its terms were agreed to by the defendant as guarantor. The purchase by Vastar Group Ltd BVI of shares in Malex Industries Bhd would be in breach of s 11 of the ECA, if permission of the controller was not obtained. Since it is the defendant who asserts that the I loan facility is in breach of s 11 of the ECA, the onus is upon him to prove that the funds were in fact applied to the purchase of shares in Malex

Industries Bhd. The defendant failed to show that the loan facility was in fact used for the purchase of shares in Malex Sdn Bhd. Given that the purpose of the loan facility was stated as being partially for the purchase of shares in a Malaysian company, Malex Industries Bhd, and the balance for investment purposes, it is not a foregone conclusion the loan facility was in fact utilised for the purchase of shares in that Malaysian company, since if approval was not obtained, the facility would appear to be capable of being used for other investment purposes. In any case, the approval of the comptroller under s 11 of the ECA is required for the issue of shares, and not for the loan facility for the purpose of buying the said shares. I would hold that the defendant fails in his reliance upon s 11 of the ECA.

The defendant had also relied upon the assertion that the plaintiff bank was conducting banking business in Malaysia without a valid licence granted under s 6(4) of the BAFIA, an activity prohibited by s 4 thereof. The issue is a factual one of whether the plaintiff bank was in fact conducting banking business in Malaysia.

It was averred by Yak Yew Chee in his affidavit that:

6.1 The banking facilities extended to the borrower by the judgment creditor were extended at the request of the judgment debtor, and not as alleged in para 11 of Tow's first affidavit.

6.2 The borrower, a company incorporated in the British Virgin Islands, started off as a shelf company and was acquired by the judgment debtor and his partner Mr Arulananda a/l K Manickam from Offshore Incorporated Ltd, an entity which, inter alia, incorporates and sells shelf companies. The judgment creditor merely provided assistance, as part of its overall customer service, for the acquisition of the said shelf company by the judgment debtor. At all material times, the beneficial ownership of the borrower company remained with the judgment debtor. The judgment creditor also assisted the judgment debtor further by subsequently facilitating the handling of the administration of the borrower by an affiliated company, viz Commerzbank International Trust (Singapore) Ltd ('CITS'). This assistance was at the express request of the judgment debtor. There was never any intention that the borrower was to be a nominee of the judgment creditor, nor was there any logical reason why it ought to be so. CITS subsequently resigned as administrator of the borrower company.

6.3 The allegation in para 13 of Tow's first affidavit that initially the letter of offer was issued in the judgment debtor's name is untrue. The letter of offer of banking facilities was issued in the name of the borrower. A copy of the letter of offer dated 3 April 1996 is now produced and shown to me and marked as exh 'YYC-5'. In the circumstances, the allegation in para 15 of Tow's first affidavit that he was guaranteeing a loan to a nominee of the judgment creditor is again baseless and untrue.

6.4 By reason of the matters set out above, the allegation in paras 14 and 16 of Tow's first affidavit that the whole loan transaction was a contrivance to circumvent and/or subvert the Malaysian laws on exchange control, and all other allegations therein, are untrue, and are denied.

6.5 The judgment creditor is advised by its Malaysian solicitors that paras 17 and 18 of Tow's first affidavit are incorrect, and there is no reason why enforcement of judgment should be refused.

It was submitted for the plaintiff, relying upon *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, that since these averments were not answered by the defendant, then it must be concluded that the facts asserted in these averments are conceded or accepted. In that case, the Court of Appeal held at p 286:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pit Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332.
>
> It can be seen that there is no principle that unless an opponent's contradiction is not answered by the party making the original assertion, that party is deemed to have conceded to the contradiction. If such a principle as submitted be adopted, there will be no end to filing of affidavits, and the party that finally makes a misstep by filing out of time loses.

The plaintiff's reply above, contradicted the defendant's assertion that the banking business was conducted in Malaysia, and proceeded to provide particulars. The determination whether the defendant's assertions, on a balance of probabilities, are true in order to dispose of the contradiction cannot be carried out on the basis of affidavit evidence because of the particular limitations of affidavit evidence. The affidavit evidence is not evidence which has been cross examined. Cross-examination gives the witness being cross examined an opportunity to explain his testimony, and tests the truthfulness of a witness' testimony in respect of those facts. His testimony which is evidence of affidavit evidence, is useful to record assertions of fact by a witness, which if accepted or at least if not disputed, or contradicted by the other party, may be accepted to establish such fact in evidence. But that is as far as the principle goes. Where it is disputed or contradicted, and the assertion of fact of either party is neither frivolous, incredible nor obviously untrue, then the proper course to determine the fact is by way of calling the deponents to give evidence orally and to be cross examined. Once an assertion is disputed or contradicted, there is no necessity to file an affidavit to maintain the earlier assertions of fact. Indeed, it is only necessary if that party intends to concede to the contrary assertion, or to demonstrate that the other party's assertions of fact in making the contradiction is frivolous, incredible or obviously untrue. Otherwise, the proper course to resolve the contradiction is by way of a trial where the deponents could be called to give oral evidence and cross examined so that a finding of fact may be made after determining their credibility.

More to the point is that the defendant's assertions are clearly disputed in the above averments for the plaintiff, who has supplied particulars. That a bank, not shown to be other than conducting bona fide banking business, should lend money to a company controlled by it and would seek an

individual to guarantee it is incredible. It is so inconceivable that any such allegation, must be supported by particulars of evidence he relies on. No such particulars were provided by the defendant. On the other hand, the affidavit of Yak Yew Chee filed on behalf of the plaintiff provided ample particulars of evidence of a normal banking transaction. There is no doubt that the defendant failed to place before the court any credible case that the plaintiff was conducting banking business in Malaysia as to warrant consideration whether: (a) there is a breach of s 4 of the BAFIA; and (b) that such breach requires the application of s 5(1)(a)(v) of the REJA.

The defendant submitted that service of the writ of summons and a copy of the order of the Singapore Court by a procedure other than that authorized by O 65 of the Rules of the High Court 1980 ('the RHC'), is an exercise of sovereignty in Malaysia by the Singapore Court other than with the consent of Malaysia, and it is therefore contrary to public policy to allow the enforcement of a judgment obtained under such an exercise.

In *United Overseas Bank Ltd v Wong Hai Ong*, the writ and statement of claim was served upon the defendant personally in Kuching by the plaintiff's agent, and not under the provisions of O 65 of the RHC. The facts are similar in this case. The fact that the agent executing service in this case is an advocate and solicitor is immaterial since O 65 of the RHC requires that service be effected by the process server. As such, the service in this does not comply with O 65 of the RHC as at the time of the service.

That service of judicial process in a foreign country is an exercise of sovereignty in that country is well established. It was so held in *Afro Continental Nigeria Ltd v The Meridian Shipping Co SA* [1982] 2 Lloyd's Rep 241 by Lord Denning. It was so held by the Supreme Court in *Sunkyong International Inc v Malaysian Rubber Development Corp Bhd* [1992] 2 MLJ 146 and followed in *United Overseas Bank Ltd v Wong Hai Ong*. In relation to s 5(1)(a)(v) of the REJA and O 65 of the RHC, Ian Chin J held:

> ... It goes without saying that Malaysia's policy like that of every other country is to protect its sovereignty and to expect foreign countries to respect it. For this purpose, the said rules had been enacted for the service of foreign legal process. It would be contrary to the public policy of Malaysia to condone a breach of the said rules. Therefore, it would be contrary to public policy in Malaysia to allow the enforcement of a judgment that was obtained consequent upon a failure to observe the said rules.

For the removal of doubt, the issue of being contrary to public policy arises from allowing the enforcement of that judgment in Malaysia where an exercise of sovereignty has been made in Malaysia without its consent, and does not question the right of the judicial authorities in Singapore to make their own rules for actions and enforcement of judgments within Singapore in such cases.

Order 65 r 2 of the RHC therefore made provisions for the service of foreign legal process, including citations in Malaysia. It is as follows:

Service of foreign legal process (O 65 r 2)

(1) This rule applies in relation to the service of any process required in connection with civil proceedings pending before a court or other tribunal of a foreign country where a letter of request from such a tribunal requesting service on a person in Malaysia of any such process sent with the letter is received by the minister and is sent by him to the High Court with an intimation that it is desirable that effect should be given to the request.

(2) In order that service of the process may be effected in accordance with this rule, the letter of request must be accompanied by a translation thereof in English, by two copies of the process to be served and by two copies of a translation of the process in English.

(3) Subject to para (4) and to any written law which provides for the manner in which documents may be served on bodies corporate, service of the process shall be effected by leaving a copy of it and of the translation with the person to be served.

Service shall be effected by the process server.

(4) Where an application on that behalf is made by the Attorney General, the court may make an order for substituted service of the process, and, where such an order is made, service of the process shall be effected by taking such steps as the court may direct to bring the process to the notice of the person to be served.

(5) After service of the process has been effected or (if such be the case) attempts to effect service of it have failed, the process server shall file a copy of the process, an affidavit made by the person who served, or attempted to serve, the process stating when, where and how he did or attempted to do so, a copy of that affidavit and a statement of the costs incurred in effecting, or attempting to effect, service.

(6) The registrar shall give a certificate in Form 144:

(a) identifying the documents annexed thereto, that is to say, the letter of request for service, a copy of the process received with the letter and a copy of the affidavit referred to in para (5);

(b) certifying that the method of service of the process and the proof of service are such as are required by the rules of the High Court regulating the service of process of the court in Malaysia or, if such be the case, that service of the process could not be effected for the reason specified in the certificate; and

(c) certifying that the cost of effecting, or attempting to effect, service is the amount so specified.

(7) The certificate given under para (6) shall be sealed with the seal of the High Court for use out of the jurisdiction and shall be sent to the minister.

A letter of request from a court or other tribunal of a foreign country requesting service upon a person in Malaysia must be received by the minister who sends the same to the High Court with an intimation that it is desirable that effect should be given to the request. Service will then be effected by the process server. This procedure embodies the giving of consent to the exercise of sovereignty in Malaysia by the foreign country by

A the service of the process of its court or other tribunal. Clearly, the procedure under O 65 r 2 of the RHC had not been complied with.

Order 65 of the RHC provides an alternative to the above, as follows:

Service of foreign legal process under Civil Procedure Convention (O 65 r 3)

B (1) This rule applies in relation to the service of any process required in connection with civil proceedings pending before a court or other tribunal of a foreign country, being a country with which there subsists a Civil Procedure Convention providing for service in Malaysia of process of the tribunals of that country, where a letter of request from a consular or other authority of that country requesting service on a person in Malaysia of any such process sent with the letter is received by the C registrar.

(2) In order that service of the process may be effected in accordance with this rule the letter or request must be accompanied by a copy of a translation of the process to be served in English.

(3) Subject to any written law which provides for the manner in which D documents may be served on bodies corporate and to any special provisions of the relevant Civil Procedure Convention, service of the process shall be effected by leaving the original process or a copy of it, as indicated in the letter of request, and a copy of the translation with the person to be served.

Service shall be effected by the process server.

E (4) After service of the process has been effected or (if such be the case) attempts to effect service of it have failed, the process server shall file an affidavit made by the person who served, or attempted to serve, the process stating when, where and how he did or attempted to do so, and a statement of the costs incurred in effecting, or attempting to effect, service.

F (5) The registrar shall give a certificate certifying:

(a) that the process or a copy thereof, as the case may be, was served on the person, at the time, and in the manner, specified in the certificate or, if such be the case, that service of the process could not be effected for the reason so specified; and

G (b) that the cost of effecting, or attempting to effect, service is the amount so specified.

(6) The certificate given under para (5) shall be sealed with the seal of the High Court for use out of jurisdiction and shall be sent to the consular or other authority by whom the request for service was made.

H Thus, where there is a Civil Procedure Convention between the foreign country and Malaysia, the request, with minor differences from the O 65 r 2 of the RHC procedure, may be made directly to the registrar by way of a request from a consular or other authority of that foreign country.

The plaintiff had not complied with either one of these two alternatives and it would be contrary to public policy in Malaysia to allow the I enforcement of the judgment which was obtained consequent upon a failure to observe the said rules. The application by the defendant in encl 11 is therefore allowed and the registration in Malaysia of Judgment

No 2059 dated 26 January 1999 of the High Court of Singapore is set aside with costs. A

Defendant's application allowed.

Reported by Lim Lee Na B

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